

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1067

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

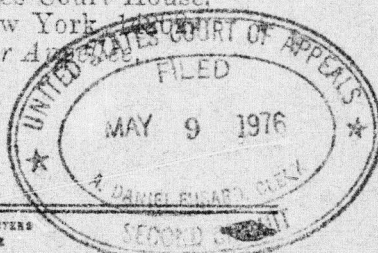
MAURICE BURSE,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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IN THE
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Docket No. 77-1067

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MAURICE BURSE,
Defendant-Appellant.

BRIEF OF APPELLEE

Preliminary Statement

On August 28, 1974, the Appellant, Maurice Burse, was indicted for the July 30, 1974 holdup of a branch of the Manufacturers & Traders Trust Company Bank located in Lackawanna, New York.

The first trial concluded on October 2, 1975, with a jury verdict of guilty on a charge of conspiring to rob the federally insured bank, 18 U.S.C., § 371, and not guilty on the charges of larceny, 18 U.S.C., § 2113(b), and robbery by intimidation, 18 U.S.C., § 2113(a). Following this Court's reversal and remand of that conspiracy conviction, *United States v. Burse*, 531 F.2d 1151 (C.A. 2, 1976), on the Trial Court's failure to give a requested alibi instruction and the prosecutor's prejudicial summation, Burse was re-tried, again before Hon.

John T. Curtin, Chief Judge, and, again, a jury returned a verdict of guilty on the conspiracy count.

On January 18, 1977, judgment was entered upon the jury's verdict returned on December 27, 1976. At that time Burse was sentenced under 18 U.S.C., § 5010(b) to the custody of the Attorney General for a term of up to six years (692)¹. His Notice of Appeal was timely filed.

Statement of the Case

Following this Court's reversal and prior to the second trial, Burse renewed his Motion to Suppress the testimony of Anna DeBose identification of Maurice Burse as the individual who was in her home the morning of the robbery. Judge Curtin by Decision and Order dated November 15, 1976, denied that Motion (App. F)². Burse also moved to dismiss the conspiracy count of the indictment on the ground that re-trial was barred by the Fifth Amendment double jeopardy clause because of the prosecutor's prejudicial closing argument during the first trial. Again Judge Curtin by Decision and Order dated August 9, 1976, denied that Motion (App. E).

Trial then commenced on December 14 with the selection of a jury with proof then commencing one week following on December 21, 1976. Prior to proof, Burse renewed his Motion to Dismiss on the ground that his re-trial was placing him twice in jeopardy (8). Judge Curtin again denied the Motion (9).

¹ Reference to Trial Transcript.

² Reference to Appellant's Appendix.

On the third day of proof, following his alibi defense, Burse rested (458). He then moved for a directed verdict of acquittal which was denied (459). He then suggested a special verdict regarding the permissibility of the photographic procedures used relating to the witness, Anna DeBose, who identified him as being one of the individuals in her apartment the morning of July 30, 1974, along with Gary Green and her stepson, Darrell DeBose (464-465, 469). Judge Curtin then denied the request for a special verdict (559), but did agree in the event of a guilty verdict, to ask each of the jurors whether or not they believed the testimony of DeBose or the testimony of Agent Davidson as to what photograph or photographs, or how many were exhibited to her (561-563). Then, in his charge, Judge Curtin told the jurors that if they believed Mrs. DeBose that three or four pictures were shown to her, including the picture of Burse whom she could not identify, that they must not consider her testimony (626-627).

After the jury had deliberated for approximately eight and one-half hours (639, 640, 647-648, 650), the Court convened the jury to advise them of weather conditions (650-651). Judge Curtin then gave the "Allen" charge (652-653) to which Burse promptly objected (654-655). Approximately one hour and ten minutes later the jury returned with a verdict of guilty (658). At that point the Judge then put the question to the jury and all but one responded by saying that the identification testimony of Anna DeBose did not enter into his decision (662).

Burse then made formal post-trial motions pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure seeking judgment of acquittal and/or a new trial on the grounds: (1) that he had been twice put in jeopardy, (2) that the Court erred in its giving of the "Allen" charge; and (3) that the testimony of Anna DeBose was error. Each of those motions was denied by Judge Curtin (675-683).

Statement of Facts

Since the essence of conspiracy is an unlawful agreement, the jury necessarily had to believe the testimony of accomplice, Darrell DeBose, to convict. Indeed, the appellant concedes that his uncorroborated testimony alone was sufficient to convict (Appellant's Brief 15-16). Nevertheless, his testimony has corroborated in many important respects.

Darrell DeBose

He testified that on the night of July 29, 1974, he was at a party with Gary Green and Maurice Burse. Burse wanted to talk so the three of them went to a nearby school parking lot where Burse said he had a plan to rob the Manufacturers & Traders Trust Company Bank on Ridge Road in Lackawanna and that Burse wanted his help (159-162). Burse told him that the two of them would go into the bank and that Gary Green would wait on the outside (162).

The following morning at about 8:30 A.M. Burse and Green came to his house to get him (163). After about fifteen minutes they left to go to the nearby home of Gary Green's aunt to pick up a sawed-off shotgun (163-164). From there they went to Downtown Buffalo where the three of them boarded a bus headed for Lackawanna, New York, and the home of Evon Wright at 40 Steelawanna Avenue in that city (165). They arrived there and remained for about ten minutes. Then they left for the bank, arriving there about 10:00 A.M. DeBose said he and Burse then went into the bank, DeBose doing the actual stick-up, while Gary Green remained outside (167-168).

He and Burse then ran out of the bank and when they got to the street Gary Green was already on the other side (171).

They ran down Wilkes-Barre Avenue, cut through an alley between Bethlehem and Lebanon Streets and went back to Evon Wright's apartment (172-173). Green then told DeBose he would get his money when he got to Buffalo (174). Burse and Green then left after a few minutes. DeBose remained with Evon Wright until sometime around 5:00 P.M. (177-178). Later that evening DeBose met Gary Green who gave him \$80.00 (177).

Corroboration

Anna DeBose, stepmother of Darrell DeBose, testified that sometime between 8:30 A.M. and 9:00 A.M. on the morning of July 30, 1974, the doorbell rang (103-104). She said Gary Green, oftentimes called Michael, and the defendant asked for her son (104-105). They remained there for some five or six minutes (107). During that time, Burse told her that the three of them were going to Lackawanna to look for a job (108). She testified that her stepson then returned around 4:00 P.M. or 5:00 P.M. (107).

Helen Jurek, the victim-teller, testified that shortly after 10:00 o'clock in the morning on July 30, 1974, she was held up by an individual whose description she provided very accurately fit that of Darrell DeBose (54, 59, 61). Of the approximate \$410.00 she gave up, a portion was bait money consisting of ten dollar federal reserve notes (67, 69).

Frank Desmore, a bank employee, testified that shortly after 10:00 A.M. he realized that Helen Jurek was being held up (77-78). He accurately described DeBose as her robber (79). Importantly, during the course of the robbery, he also noticed a shorter black male positioned between the double doors at the Wilkes-Barre side of the bank (81). Shortly after the two robbers left, he exited the bank and ran down Wilkes-

Barre. During the course of the chase, he observed one of them run behind a house on Lebanon Street (82-83). He then continued on Wilkes-Barre to Bethlehem and as he looked in a westerly direction he saw two individuals running away from him (85-86). He testified that the one looked like the individual he saw in front of Helen Jurek's tellers cage (86) and the other, about 5'8" in height, like the individual he saw earlier between the Wilkes-Barre Avenue double-entrance doors (91). He then lost sight of them as they turned on to Steelawanna (92-93).

Barbara Ramos who lived at the corner of Wilkes-Barre and Lebanon Streets in Lackawanna (395), testified that sometime between 10:00 and 11:00 o'clock on the morning of July 30, 1974, two boys ran past her as she came out of her house (397, 400). She said that one of them was a tall thin individual with a dungaree cap and the other was about 5'5" or 5'6" (400-401). She identified DeBose by photo as one of them (407) and the other as Burse (404). She testified that she had seen Burse many times before in the neighborhood (402) and when asked by defense counsel whether or not there was any possibility that, "Maurice Burse is not the person who ran past you that day?", she responded by saying, "No, there is no possibility" (421).

Evon Wright who lived at 40 Steelawanna Avenue at the time, testified that sometime between 9:00 and 10:00 o'clock on the morning of July 30, 1974, her friend, Kenny Burse, asked her if his brother Maurice could use the apartment (282-283). She said that sometime between 9:30 A.M. and 10:00 A.M. Maurice, Gary Green and an individual she knew as "Spider" came to her apartment (283)³. She said that they were there for about five minutes then left (284). She further

³ Darrell DeBose testified that he is commonly known as "Spider" (198).

testified that about 11:00 o'clock in the morning the three of them came back to the apartment, that Green and Burse stayed outside (284-285), but that "Spider" came in and went into the bedroom (285). He stayed until sometime between 5:00 or 6:00 o'clock that night (287) and before leaving gave her \$10.00 (289).

Lastly, DeBose's claim that Green was also one of the robbers was corroborated by the fact that when Green was arrested on August 1, 1974, he was in possession of two of the \$10.00 bait bills (153-154).

ARGUMENT

POINT I

Re-trial of Burse was not barred.

This court reversed the prior conviction of Burse and remanded for a new trial on two grounds: (1) the Trial Court erred in not giving a requested alibi instruction; and (2) the government's closing argument violated permissible standards of prosecutorial conduct. *United States v. Burse*, 531 F.2d 1151 (C.A. 2, 1976). Burse now claims that the second ground for reversal rises to such a level of prosecutorial misconduct as to bar his re-prosecution. That question is only reached where the first trial aborts for one reason or another. *United States v. Dinitz*, 424 U.S. 600 (1976). Where a conviction resulted, as here, the proper remedy is to vacate the conviction and order a new trial. *United States v. Guillette*, 547 F.2d 743, 753 (C.A. 2, 1976), which is precisely what this court did.

That aside, the mere fact of prosecutorial misconduct does not mean that re-prosecution is barred. That is the rare situation. Re-prosecution is only barred where such conduct

threatens the "harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." *United States v. Jorn*, 400 U.S. 470, 485 (1971); *Downum v. United States*, 372 U.S. 734, 736 (1963). See also, *United States v. Dinitz*, *supra*, at 611. In other words, the conduct of the prosecutor must be such that he, by gross negligence or intentional misconduct, creates a mistrial so that he has a better shot at conviction in a subsequent trial. *United States v. Kessler*, 530 F.2d 1246, 1256 (C.A. 5, 1976); *United States v. Dinitz*, *supra*; *United States v. Wilson*, 534 F.2d 76, 80-81 (C.A. 6, 1976) and cases cited therein. Examples of such conduct sufficient to bar a re-trial are found in *Kessler*, *supra*, where the prosecutor introduced damaging hearsay testimony knowing full well that he could not connect it up by virtue of the fact that the necessary witness had refused to appear and was not subject to the subpoena power of the United States and where, further, the prosecutor introduced into evidence a damaging exhibit which had no nexus to the case well knowing that at the time of introduction and in *Downum*, *supra*, where the prosecutor commenced jury selection knowing that his key witness was missing and then moved for a mistrial when he was unable to proceed because of that fact and a mistrial was declared over the objection of the defendant who, of course, lost his valued right to have that tribunal judge his fate. See *United States v. Jorn*, *supra*, at 485.

Here, no prosecutorial advantage was gained by the re-trial. Indeed, Burse admits that the second trial was an "instant replay" of the first (Appellant's Brief, p. 4). Further, courts have held that the district court is the proper fact finder to determine whether or not such prosecutorial over-reaching or misconduct is such conduct as to gain the prosecution a better shot at conviction. See *United States v.*

Wilson, supra, at 82. Here, Judge Curtin had an opportunity to make such a determination, the first time prior to the commencement of the second trial and, again, in ruling on Burse's post-trial motions. On each occasion, Judge Curtin, an even-handed trial judge (Appellant's Brief, p. 38), did not so find (App. E, 1). His failure to find is supported by the fact that the prosecution presented virtually the same witnesses and evidence at both trials. In other words, the prosecution did not strengthen its case. The lack of grossly negligent or intentional conduct created to cause a mistrial is also supported by the record of the first trial which shows that that prosecutor preferred to continue with the first trial for he argued vigorously against the mistrial motion made by Burse. In a situation such as this, the Fifth Circuit refused to find that re-prosecution was barred. *United States v. Beasley*, 479 F.2d 1124, 1127 (C.A. 5, 1973).

Burse also claims that since he was found not guilty of the substantive offenses on the first trial, the government should have been foreclosed from putting in proof that he participated in the robbery on the principle of *res judicata* or collateral estoppel, citing *Ashe v. Swenson*, 397 U.S. 436 (1970). To support a former jeopardy claim in this context, offenses are not the same simply because they arise out of the same general course of criminal conduct. They are only the same when evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. *United States v. Cala*, 521 F. 2d 605, 607 (C.A. 2, 1975), and the cases cited therein. The gift of conspiracy is the unlawful agreement which was not an element to be proved to support a conviction of the substantive offenses of bank robbery.

The principle of collateral estoppel prevents a defendant in a criminal case from being convicted on the basis of an

ultimate issue of fact which had been determined in his favor in the prior criminal proceeding. In the first trial, the jury obviously found that he entered into an unlawful agreement to rob the bank for that jury convicted him of the conspiracy count. Under these circumstances the appellant cannot foreclose the government from proving the conspiracy, an entirely different crime, for the issue of the unlawful agreement was resolved against him in the first trial. *United States v. Cala, supra*.

POINT II

The "Law of the Case" doctrine precludes re-litigation of the identification testimony of Anna DeBose.

During the course of the first trial, counsel for Burse objected to the testimony of Mrs. DeBose and asked that it be stricken. He also moved for a mistrial on the ground that he was prejudiced as a result of that testimony. Judge Curtin denied each of those motions at that time (Transcript of First Trial 302-305). Counsel then renewed his claim in a post-verdict motion pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. And again the Judge denied his motions (Transcript of First Trial 953-956, 972). This Court on the First Appeal affirmed the ruling of Judge Curtin finding that, "Because of the independent basis which existed for Mrs. DeBose's identification, the alleged facts of this case would not establish grounds for a reversal under *Simmons* and *Brathwaite*." *Burse, supra*, at 1155.

Again, prior to retrial, Burse moved anew to suppress the identification testimony of Mrs. DeBose and, again, Judge Curtin refused to suppress her testimony (App. F). Burse then renewed his arguments in post-verdict motions pursuant to

Rules 29 and 33 of the Federal Rules of Criminal Procedure. Again Judge Curtin refused to find that the photographic identification procedures used were impermissibly suggestive (683).

While Burse makes much of the fact that during the Second Trial there was no testimony from Mrs. DeBose that her identification was independent of her viewing a photograph or photographs, that was decided against him in the First Trial and affirmed by this Court on appeal. The prosecutor was entitled to rely upon those decisions in the re-trial.

Courts have held that where an appellant attempts to re-raise issues previously decided by an Appellate Court and no petition for a rehearing was filed from its judgment, those issues cannot be reconsidered. Federal Rules of Appellate Procedure, Rule 40. See *United States v. Gargotto*, 510 F.2d 409, 412 (C.A. 6, 1974), *cert. denied*, 95 S.Ct. 1990 (1975). In other words, the law of the case may not be changed unless the Appellate Court does so by terms of its remand. *United States v. Fernandez*, 506 F.2d 1200, 1202 (C.A. 2, 1974). See also *United States v. Librach*, 536 F.2d 1228, 1232 (C.A. 8, 1976).

For the foregoing reasons, Burse is foreclosed from re-litigating the admissibility of the identification testimony of Anna DeBose.

POINT III

The "Allen" charge was not improper.

While the trial commenced on December 14, 1976, and concluded on December 27, 1976, the days of proof numbered but three. During that time the government called eleven witnesses, the key witness being Darrell DeBose. And since the

Second Trial was nothing more than an "instant reply" of the First, Judge Curtin's observation of the First Trial in appropos, namely, ". . . [This] is a case where the jury could easily have voted up or down on the evidence presented here." *Burse, supra*, at 1153 n.1. The government sets this forth in an attempt to demonstrate that this was not an unduly difficult case to decide so that, under the circumstances, the Court's *sua sponte* "Allen" charge after approximately eight and one-half hours (639, 640, 647-648, 650) deliberation, probably six to six and one-half hours excluding lunch and dinner, was not unreasonable.

At no time did the jury report how they stood numerically and the Judge took great pains to avoid, "the pitfalls of coercive deadlines, threats of marathon deliberations, or pressures for surrender of conscientiously held minority views." *United States v. Skinner*, 535 F.2d 325, 326 (C.A. 5, 1976). This Court has time and again upheld an "Allen" or modified "Allen-type" charge so long as the Trial Judge conscientiously phrases the charge so that no juror feels coerced into abandoning his personal convictions. See *United States v. Adcock*, 447 F.2d 1377, 1338 (C.A. 2, 1971), *cert. denied*, 92 S.Ct. 278; *United States v. Bermudez*, 526 F.2d 89 (C.A. 2, 1975), *cert. denied* 425 U.S. 970; *United States v. Rodriguez*, 545 F.2d 829 (C.A. 2, 1976).

The Judge's words to the jury constituted a "very soft encouragement . . . to come together" (679). He told them (652-653):

I do not want to tell you how to go about your deliberations because I have charged you before. It is certainly your job as jurors to come to a conscientious judgment, one that must be unanimous. You should not give up your sincerely and conscientiously held views for any petit reason. On the other hand, every juror must not

only give his own reasoned well thought out considered views to his fellow jurors, but he should also listen to the well thought out considered views of his fellow jurors. Sometimes it is a good idea when anyone of us have a problem and we go along and we are having some difficulty . . . to start with a new position, perhaps start approaching the problem from a new area.

The Judge went on to quote verbatim the oft-quoted passage from *Allen v. United States*, 164 U.S. 492, 501 (1896) and concluded by telling them (654):

. . . but again I repeat it is up to each juror to review the evidence and to vote according to his own conscientious judgment.

Under these circumstances, Burse was not prejudiced.

Conclusion

In considering the entire record, the appellant was accorded a fair trial under all the circumstances. The judgment appealed from should, therefore, be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

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County of Genesee) ss.:
City of Batavia)

RE: U.S.A.
vs
Maurice Burse
No. 77-1067

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502 U.S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

6th day of May, 1977

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978